4808.

SUPREME COURT OF THE UNITED STATES.

No. 153.

SIMEON BENJAMIN, PLAINTIFF IN ERROR,

vs.

OLIVER B. HILLARD AND MOSES C. MORDECAI.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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GIDEON, print.

4809

UNITED STATES OF AMERICA,
Southern District of New York, ss.

I, Kenneth G. White, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of December, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the said United States the eighty-third.

[SEAL.]

KENNETH G. WHITE,
Clerk.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the judge of the Circuit Court of the United States, for the second circuit and southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you between Oliver B. Hillard and Moses C. Mordecai, plaintiffs, and Simeon Benjamin, defendant, a manifest error hath happened, to the great damage of the said Simeon Benjamin, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this fifth day of October, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States the eighty-third.

KENNETH G. WHITE,
Clerk.

The return to the writ of error herein appears in the schedules hereto annexed.

[L. S.] KENNETH G. WHITE,
Clerk.

Allowed Oct. 5, 1858.

SAM'L R. BETTS.

Filed Oct. 5th, 1858.

Supreme Court of the United States.

SIMEON BENJAMIN
v.
OLIVER B. HILLARD and MOSES C. MORDECAI. } In Error.

Know all men by these presents, that we, Simeon Benjamin, Chauncy W. Moore, William M. Robbins, are held and firmly bound unto the above named Oliver B. Hillard and Moses C. Mordecai, in the sum of twelve thousand dollars, to be paid to the said Oliver B. Hillard and Moses C. Mordecai, their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the fifth day of October, in the year of our Lord 1858. Whereas the above named Simeon Benjamin hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the circuit court of the United States, for the second circuit and southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named Simeon Benjamin shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. BENJAMIN, [L. S.]
CHAUNCY W. MOORE, [L. S.]
WM. M. ROBBINS. [L. S.]

Sealed and delivered in the presence of and acknowledged before me, this 5th Oct., 1858.

R. E. STILWELL,
U. S. Com'r.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Simeon Benjamin, Chauncy W. Moore, and William M. Robbins, being severally duly sworn, say, and each for himself says, that he is a resident and freeholder in the State of New York, and

is worth the sum of twenty-four thousand dollars over and above all his debts and liabilities.

S. BENJAMIN,
CHAUNCY W. MOORE,
WM. M. ROBBINS.

Sworn to before me, this 5th day of Oct., 1858.

R. E. STILWELL,
U. S. Com'r.

Endorsed: Supreme Court U. S. Simeon Benjamin, plff. in error, vs. Oliver B. Hillard and al., deft's in error. Bond.

C. TRACY, *Att'y.*

Bond approved Oct. 5, 1858.

SAM'L R. BETTS.

Filed Oct. 5th, 1858.

Citation.

UNITED STATES OF AMERICA, *ss.*

To Oliver B. Hillard and Moses C. Mordecai, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and southern district of New York, wherein Simeon Benjamin is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 5th day of October, in the year of our Lord 1858.

SAM. R. BETTS.

Due service of copy admitted Oct. 5, 1858.

GEO. C. GODDARD,
Att'y for Defd'ts in Error.

Filed Oct. 6, 1858.

Pleas in the Circuit Court of the United States for the southern district of New York, held at the City Hall, in the city of New York, of the 22d day of November, in the year one thousand eight hundred and fifty-one; present, the Hon. Samuel Nelson.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Oliver B. Hillard, a citizen of Pennsylvania, and Moses C. Mordecai, a citizen of South Carolina, plaintiffs, complain of Simeon Benjamin, a citizen of the State of New York, being in custody, &c., of a plea of trespass on the case, &c.

For that whereas, heretofore, to wit, on or about the first day of December, 1847, at Elmira, in the State of New York, the said plaintiffs, under the name of Hillard & Mordecai, entered into an agreement in writing with certain persons doing business under the name of Hopkins & Leach, in substance as follows:

Memorandum of an agreement made the eleventh day of September, 1847, between Hopkins & Leach, of Elmira, State of New York, of one part, and Hillard & Mordecai, of Wilkesbarre, State of Pennsylvania, of the other part, witnesseth: Said Hopkins & Leach agree to make at their foundry, in Elmira, and deliver to said Hillard & Mordecai, in Wilkesbarre, one steam-engine and two boilers, and all the apparatus thereto belonging to make a full and complete engine, to wit: one engine, cylinder of eighteen inches bore and three feet stroke, one balance wheel of five tons weight or thereabouts, one engine shaft, one spur wheel, one pedestal and composition linings for end of engine shaft, all the cranks, cylinder cams, and valve connections, and one governor. All of which are to be built upon and attached to a substantial iron frame, so proportioned and constructed as to require only ordinarily substantial brick or stone wall to erect the machinery upon.

Hopkins & Leach further agree to make the aforesaid boilers of first quality Pennsylvania iron, forty-two (42) inches diameter, and twenty-two feet long, with wrought-iron heads, and each having two return flues of fourteen inches diameter. Also, breeches for the boiler, and one smoke-pipe fifty feet in height, one front and top plate; all the necessary stands, grate, and stay bars, wrought-iron bolts, rods, &c., used in and about the arch; also, all the cocks, valves, cast-iron, copper, tin, lead, or other pipes for water or steam; one wrought-iron heater or tank, one force-pump, and one lifting pump, with separate shafts and pulleys for each; and all other materials (except foundation and mason work) necessary to connect the whole together and put the same in full and complete operation. All of which is to be made of the best materials and in the most substantial and workmanlike manner, and warranted to be of sufficient strength and capacity to drive six run of stones, with all the gearing and machinery attached thereto, perfectly and necessary for flouring and gristing purposes for the whole six run of stones.

And furthermore, all the connections, together with the cylinder heads, steam-chest, side pipes, &c.; all to be polished, finished, and furnished in the usual neat and tasteful style of a finished engine.

Hopkins & Leach further agree that when the aforesaid foundations are finished and ready for the reception of the machinery, and after the same shall have been delivered as hereinafter provided, they will immediately erect thereon and put the same in

full and complete operation, provided, however, that the said Hillard & Mordecai shall give them (H. & L.) at least ten days' notice, by letters or otherwise, of the time the foundations will be completed, and furnish them, without charge, such assistance as shall be necessary to move the boilers and machinery on the foundation. All of which is to be furnished, delivered, and finished as aforesaid, by the said Hopkins & Leach to said Hillard & Mordecai, for the sum of three thousand one hundred and fifty dollars, ($3,150.)

Hopkins & Leach further agree to make at their foundry, and deliver to said Hillard & Mordecai, at Wilkesbarre, all of the cast-iron, wrought-iron, steel, and composition work for driving six run of stones, and the necessary machinery attached, to be made of the best materials, warranted and of the best workmanship and proportions, and finished according to the directions of said Hillard & Mordecai's millwright, to wit, Isaac Mead, of Elmira, and at the following prices, to wit:

Cast-iron work 4½ cents per lb., finished.
Wrought-iron work 12½ cents per lb., finished.
Composition work 50 cents per lb., finished.
Damsels $3 each.
Lighter-screws $3 each.
Hoisting-screws $15 each.

Said Hillard & Mordecai, on their part, agree to purchase of Hopkins & Leach all the aforesaid engine, boilers and machinery upon the terms and conditions hereinbefore stated, and pay them for the same as follows: Two thousand dollars on or about the 1st day of Dec'r, 1847, two thousand dollars on or about the first day of February, 1848, and the balance of the money when the contract is fully completed.

The said Hopkins & Leach agree to pay the legal interest on the above amounts from the day they receive them to the time of the completion of this contract. It is understood by the parties that Hopkins & Leach are to have all the aforesaid machinery completed, and are to deliver the same in Wilkesbarre, (accidents from the elements on the river excepted,) upon the first safe and navigable rise of water in the ensuing spring. They are also to procure a suitable ark for the conveyance of the same, together with a certain lot of millwright work and lumber to be built and furnished in Elmira by Isaac Mead for said Hillard & Mordecai, and that the said parties are each to pay a proportional share per ton of lading for the cost of ark, and transportation of the same from Elmira to Wilkesbarre.

It is also understood, that in case said Hillard & Mordecai shall so require, Hopkins & Leach shall, before receiving the same, give a responsible individual for security for the money and for the fulfilment of this contract, which is to be paid as hereinbefore men-

tioned, as by the said agreement, sealed with their seals and ready in court to be produced, will fully appear.

And the plaintiffs further state, that pursuant to the agreement aforesaid, they then and there required of the said Hopkins & Leach security for the said money to be advanced, and for the performance of the said contract.

And thereupon, then and there, the said defendant executed and delivered to the plaintiff simultaneously with the delivery of the said contract, and endorsed thereon in writing, and subscribed by the said defendant, an agreement in substance and to the effect following:

For value received, I hereby guarantee the performance of the within contract on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid.

And the plaintiffs further show, that the said Hopkins & Leach entered upon the performance of said agreement, and proceeded to construct a steam-engine, boiler, and appurtenances for the plaintiffs, and to put up the same for the plaintiffs in their mill in Wilkesbarre aforesaid, and to deliver to them iron work and composition work for the said mill; and the plaintiffs, pursuant to said contract, paid to the said Hopkins & Leach, on the said agreement, and at their request, the sum of 5,608 dollars 25 cents, to wit, the sum of 2,000 dollars on or about the 1st day of December, 1847, the further sum of 2,000 dollars on or about the 1st day of February, 1848, and the balance on or about the 18th day of Dec'r, 1848.

And the plaintiffs further say, that when it was attempted to put the said mill with the engine and appurtenances in operation, it was found, and such they allege the fact to be, that the said engine and boiler, and appurtenances, in said contract mentioned, were not made of the best materials, nor in the most substantial or workmanlike manner, nor of sufficient strength or capacity to drive six run of stone with the gearing and machinery attached thereto, perfectly, and necessary for flouring and gristing purposes, for the whole six run of stones.

And that the said Hopkins & Leach, when the foundations were finished and ready to receive the machinery, did not put the same in full and complete operation, although the plaintiffs gave them notice, as provided in said contract, when the foundations were completed, and furnished the assistance his said contract mentioned.

That the said Hopkins & Leach did not make and deliver to the plaintiffs, as provided in said contract, all the iron and composition work for driving six run of stone and the necessary machinery attached, and did not make them of the best materials and work-

manship, nor proportioned or finished according to the directions of Isaac Mead in said contract named; and that, on the contrary thereof, the said work was of poor materials, and insufficient in strength and quality, and done in an unsubstantial and unworkmanlike manner, and was not of sufficient strength or capacity to drive six run of stone, as the said Hopkins & Leach had agreed as aforesaid.

And the plaintiffs further allege, that by reason of the non-performance and mal-performance by the said Hopkins & Leach, of the said contract, on their part, the plaintiffs were unable to use the said mill, and when they could use it at all, they could only use a much smaller number of run of stones than is provided for by said contract, of all which the said Hopkins & Leach and the said defendant then and there had notice, and the said Hopkins & Leach were then and there requested to perform said contract, and to supply and correct said defects, and wholly neglected and refused so to do, of which also the said defendant then and there had notice.

And the plaintiffs further show, that by reason of such non-performance and ill performance of the said contract on the part of the said Hopkins & Leach, in order to put the said engine and machinery in operation, as the said Hopkins & Leach had agreed to do, and had neglected to do, they were obliged to expend and pay, and did expend and pay for work and labor thereon, and materials therefor, a further large sum of money, to wit, the sum of four thousand five hundred dollars, all which was necessary to complete the work under said contract, as the said Hopkins & Leach had therein agreed to perform it, of which the said Hopkins & Leach and the said defendant then and there had notice.

And the plaintiffs further say, that by reason of such non-performance and ill performance of said contract on the part of the said Hopkins & Leach, the said mills of the said plaintiffs could not be kept in operation or used, and the plaintiffs were forced and obliged to remain idle and unemployed for a long space of time, to wit, for the space of one year, to the great loss and damage of the plaintiffs, to wit, to the further sum of seven thousand five hundred dollars, of which the defendant and the said Hopkins & Leach then and there had notice.

And the plaintiffs further show, that they have in all respects kept and performed said contract with the said Hopkins & Leach on their part; that the defendant heretofore, to wit, on the 26 day of May, 1849, at the southern district of New York aforesaid, and at divers other times, has had notice of the said non-performance of said contract by the said Hopkins & Leach, and has been requested to comply with his said guarantee of the performance of said contract, and to pay the plaintiffs the damages they have sustained by reason of such non-performance, and the sums of money they have paid and advanced on said contract, and the interest

thereon. But the said Hopkins & Leach and the said defendant *has* wholly neglected and refused, and still do neglect and refuse to pay the same.

All which is to the plaintiffs' damage 20,000 dollars, and therefore they bring suit, &c.

And the said Simeon Benjamin, defendant, by Charles Tracy, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, &c., and of this he puts himself upon the country, &c., and the plaintiffs do the like, &c.

And hereupon the process thereof is continued between the parties aforesaid, of the plea aforesaid, in this same court, before the justice thereof, until the first Monday of April, of April term, in the year one thousand eight hundred and fifty-six, at the City Hall in the city of New York, and the same day is given to the parties aforesaid at the same place; at which last mentioned day, before the said parties, at the place last aforesaid, come the parties aforesaid, by their attorneys aforesaid.

And the jurors of the jury summoned to try the said issue also come, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, say, upon their oath, that the said defendant did undertake and promise in manner and form as the said plaintiffs have within complained against him. And they assess the damages of the said plaintiff, by reason of the not performing the said promises and undertakings, over and above their costs and charges by them about their trial in this behalf expended, to six thousand dollars, and for those costs and charges to six cents.

And because the justices here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid here until the first Tuesday of September, of the term of September, in the year one thousand eight hundred and fifty-eight, to hear their judgment thereupon.

At which day, before the said justices here, come as well the said plaintiffs as the said defendant, by their attorneys aforesaid; and hereupon all and singular the premises being seen, and by the said justices here fully understood, and mature deliberation being thereupon had, it is considered that the said plaintiffs do recover against the said defendant their said damages, costs, and charges, by the jurors aforesaid in form aforesaid assessed; and also eighteen hundred and sixty-nine $\frac{15}{100}$ dollars for their said costs and charges by the court now here adjudged of increase to the said plaintiffs, and with their assent; which said damages, costs, and charges in the whole amount to seven thousand eight hundred and sixty-nine dollarsand fifteen cents. And the defendant in mercy, &c.

Judgment signed this 23d day of Sept., 1858.

KENNETH G. WHITE, *Clerk.*

Endorsed: U. S. Circuit Court. Oliver B. Hillard and Moses C. Mordecai vs. Simeon Benjamin. Judgment Roll. Geo. C. Goddard, att'y. Filed Sept. 23, 1858.

Circuit Court of the United States for the southern dist. of New York.

SIMEON BENJAMIN ads. OLIVER B. HILLARD and MOSES C. MORDECAI. } Bill of Exceptions.

This cause was tried at the circuit court, in the city of New York, before the Honorable Samuel Nelson, a justice of the Supreme Court of the United States, on the 5, 7, 8, 9, and 10th days of May, 1858.

The plaintiffs proved and read in evidence an agreement between them and Hopkins & Leach, dated Sept. 11, 1847, and a guaranty on the same paper, signed by the defendant, as follows:

Memorandum of an agreement made the eleventh day of September, 1847, between Hopkins & Leach, of Elmira, State of New York, of one part, and Hillard & Mordecai, of Wilkesbarre, State of Pennsylvania, of the other part, witnesseth:

Said Hopkins & Leach agree to make, at their foundry in Elmira, and deliver to said Hillard & Mordecai, in Wilkesbarre, one steam-engine and two boilers, and all the apparatus thereto belonging to make a full and complete engine, to wit: one engine cylinder of eighteen inches bore and three-feet stroke, one balance-wheel of five tons weight or thereabouts, one engine-shaft, one spur-wheel, one pedestal and composition linings for end of engine-shaft, all the crank, cylinder, cam, and valve connections, and one governor; all of which are to be built upon and attached to a substantial iron frame, so proportioned and constituted as to require only ordinarily substantial brick or stone wall to erect the machinery upon.

Hopkins & Leach further agree to make the aforesaid boilers of the first-quality Pennsylvania iron, forty-two (42) inches diameter, and twenty-two feet long, with wrought-iron heads, and each having two return flues of fourteen inches diameter, also breeches for the boiler, and one smoke-pipe fifty feet in height; one front and top plate; all the necessary stands, grate and stay bars, wro't-iron bolts, rods, &c., used in and about the arch; also all the cocks, valves, cast-iron, copper, tin, lead, or other pipes for water or steam; one wrought-iron heater or tank; one force-pump and one lifting-pump, with separate shafts and pulleys for each; and all other materials (except foundation and mason work) necessary to

connect the whole together, and put the same in full and complete operation; all of which is to be made of the best materials and in the most substantial and workmanlike manner, and warranted to be of sufficient strength and capacity to drive six run of stones, with all the gearing and machinery attached thereto perfectly and necessary for flouring and gristing purposes for the whole six run of stones; and furthermore, all the connection, together with the cylinder-heads, steam-chest, side pipe, &c., are to be polished, finished, and furnished in the usual neat and tasteful style of a finished engine.

Hopkins & Leach further agree, that when the above said foundations are finished and ready for the reception of the machinery, and after the same shall have been delivered as hereinafter provided, they will immediately erect thereon, and put the same in full and complete operation, provided, however, that the said Hillard & Mordecai shall give them (Hopkins & Leach) at least ten days' notice, by letter or otherwise, of the time the foundation will be completed, and furnish them with such assistance, without charge, as shall be necessary to move the boilers and machinery on the foundation. All of which is to be furnished, and delivered, and finished as aforesaid, by the said Hopkins & Leach to said Hillard & Mordecai for the sum of three thousand one hundred and fifty dollars, ($3,150.)

Hopkins & Leach further agree to make at their foundry and deliver to said Hillard & Mordecai, in Wilkesbarre, all of the cast-iron, wrought-iron, steel, and composition work for driving six run of stones, and the necessary machinery attached, to be made of the best materials, warranted, and of the best workmanship, and proportioned and finished according to directions of said Hillard & Mordecai's millwright, to wit, Isaac Mead, of Elmira, and at the following prices, to wit: cast-iron work, 4½ cents per lb.; finished wrought-iron work, 12½ cents per lb.; finished composition work, 50 cents per lb.; finished damsels, 3 each; lighter screws, $3 each; hoisting screws, $15.

Said Hillard & Mordecai, on their part, agree to purchase of Hopkins & Leach all the aforesaid engine, boilers, and machinery, upon the terms and conditions hereinbefore stated, and pay them for the same as follows: two thousand dollars on or about the 1st day of December, 1847; two thousand dollars on or about the 1st day of February, 1848; and the balance of the money when the contract is fully completed.

The said Hopkins & Leach agree to pay the legal interest on the above amounts from the day they receive them to the time of the completion of this contract.

It is understood by the parties that Hopkins & Leach are to have all the aforesaid machinery completed, and are to deliver the same in Wilkesbarre, (accidents from the elements on the river

excepted,) upon the first safe and navigable rise of water in the ensuing spring. They are also to procure a suitable ark for the conveyance of same, together *together* with a certain lot of millwright work and lumber, to be built and finished in Elmira by Isaac Mead for said Hillard & Mordecai; and that the said parties are each to pay a proportional share per ton of lading for the cost of ark and transportation of the same from Elmira to Wilkesbarre.

It is also understood that, in case said Hillard & Mordecai shall so require, Hopkins & Leach shall, before receiving the same, give a responsible individual for security for the money and for the fulfilment of this contract, which is to be paid as hereinbefore mentioned.

In witness whereof, the parties have hereunto subscribed their names and affixed their seals.

HOPKINS & LEACH, [L. S.]
HILLARD & MORDECAI. [L. S.]

D. MORDECAI.
[L. S.]

For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach, and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid.

Elmira, Dec. 1st, 1847.

S. BENJAMIN.

Testimony taken at Wilkesbarre, under a commission issued on the part of the plaintiffs, upon interrogatories and cross-interrogatories, was read in evidence on the trial. The following are extracts from said commission, as returned and read:

Question by plaintiff to William L. Stuart. Were you called on to make a survey and examination of the engine, boilers and apparatus in question; if yea, by whom? State if others were with you, and who, and whether you made such examination, and when, and what was the result.

(The defendants' counsel objects to this question, on the ground that the proceeding that led to the examination and survey referred to was ex parte in its character, and without notice to Hopkins & Leach, or the defendants.)

Answer. I was called on by Mr. Hillard to make an examination and survey of this engine and boilers, and James Brooks, of Frankfort, Philadelphia county, and Thomas Thatcher, then living in Wilkesbarre, were with me; they were machinists. We made a survey and examination of the engine, boilers and apparatus, at the plaintiffs' mills, on the 23d June, 1849; the result of that examination was reduced to writing and signed. This is my signa-

ture to this paper now produced and marked B, identified and attached.

The Exhibit B objected to by defendants' counsel, because it is the result of an ex parte proceeding on the part of the plaintiffs, without notice or knowledge brought home to either Hopkins & Leach, or the defendants.

Question by defendant. Does this statement, marked B, present all of the difficulties that you discovered as to the working of the engine?

Answer. If connecting the engine with the mill in the manner in which it was connected be one of the difficulties in the working of the engine, that is not included in the statement; otherwise it contains all of the difficulties I discovered at that time.

Question by defendant. State whether you suggested in the statement B all the different remedies for all the difficulties you discovered in the working of the engine.

Answer. We did.

Question by defendant. State whether the diffierent alterations to remedy the difficulty were subsequently made or adopted.

Answer. They were all made, except increasing the weight of fly-wheel.

Question by defendant. Do you know how the engines worked after the alterations were made which you suggested?

Answer. I have no recollection of seeing it run afterwards.

Question by defendant. State whether the eccentric you recommended and was put on, worked to your satisfaction until the foundation was repaired.

Answer. It was not put on until after we repaired the foundation.

Question by defendant. Do you think that the eccentric you recommended would have obviated the difficulty without change of the foundation?

Answer. Not wholly; I think it would have worked better with an eccentric than a cam.

Question by defendant. State why you recommended an additional weight to the rim of the fly-wheel, if, in your opinion, the arms were not sufficient to sustain it.

Answer. At the time we made the survey, that was an objection brought forward by myself against putting the weight on; but at the same time I thought the weight was necessary.

Extracts from the testimony of David Mordecai, read from said commission:

Question by defendant. As the agent of the parties, and particularly of your brother, did you agree to, and approve of, the alterations, changes, and repairs, suggested and set forth by the survey?

Answer. Mr. Hillard was here himself, and he consulted me on

every point before he acted; and I gave it to him as my opinion that the work suggested by the survey had better be done at once.

Question by defendant. Were the suggestions of the surveyors adopted by Hillard & Mordecai, and were orders given to Mr. Laning for carrying them out?

Answer. Orders were given to Mr. Laning to do work that the surveyors recommended.

Question by defendant. Was there more or less work ordered of Mr. Laning than the surveyors recommended?

Answer. My opinion is that Mr. Laning did no more work under the head of the survey than was recommended by it.

The plaintiffs gave evidence to prove the payment to Hopkins & Leach required by said contract, and in connection therewith the account made out by plaintiffs, with the receipt of Hopkins & Leach thereon, as follows:

	Hopkins & Leach,	Dr.	Cr.
1847.			
Dec. 12.	To amount draft remitted them...	2,000 00	
1848.			
Jan'y 14.	" our acceptance for them a 35 days, due 11–14 Feb'y..	700 00	
Feb'y 3.	amount our acceptance for them, 35 days, due 22–25 Feb'y.....	1,720 00	
Ap'l 5.	cash.....	50 00	
" 9.	am't our note this day, a 4 mos., payable N. Y.....	1,100 00	
May 24.	cash paid Leach.....	85 00	
Nov. 1.	am't paid Stewart.....	10 00	
" 18.	" "	5 00	
" 27.	" " for lampblack	30	
April 9.	By am't paid B. F. Bailey.....		500 00
Dec'r 18.	To cash paid Leach.....	32 25	
	" " tolls.....	2 93	
	By am't bill rendered.....		5,608 25
	To int. on money advanced to date	221 02	
	am't store account.....	34 52	
	mill account for lumber, labor, and carpentering, &c.....	40 79	
	am't Wells' bill paid.....	30 00	
	am't P. H. Bease, B., which is included in payments under general mill.....	6 00	
	am't A. Beebe bill.....	8 41	
	" J. B. Williams.....	4 40	

1848.				
Dec'r 18.	To am't John Beebe.....		1 00	
	" A. B. Laning.....		6 75	
	" H. & F. McAlpine.....		49 88	
			$6,108 25	$6,108 25
	A'mt credit.....	6,108 25		
	Deduct am't paid Bayley.....	500 00		
		$5,608 25		

Memorandum of Castings, &c., taken from the books of Hopkins & Leach.

1847.			
Dec. 18,	1 upright shaft.....		lbs. 937
	1 bevel wheel.....		530
	3 bore wheels.....		2,392
" 23.	1 bevel wheel.....		528
"	1 " "		525
	3 sleeves to uprights, 93.....		279
" 28.	3 couplings, ea. 76.....		228
" 29.	1 bevel wheel.....		406
	1 " "		406
1848.			
Jan. 4.	1 " "		406
	1 upright shaft.....		941
	6 spindles.....		1,087
" 14.	1 line shaft.....		2,525
	1 line shaft.....		1,588
	1 upright shaft.....		940
	6 stone pinions.....		1,293
	6 sleeves.....		309
	6 bails.....		231
	6 drivers.....		110
	6 bridge pots.....		222
	6 bushes.....		247
	3 core wheels, ea. 190.....		570
	1 line shaft.....		1,717
	1 sillar block and linings.....		756
	3 half S blocks and linings.....		510
	10 gudgeons' necks, 16 in. long.....		219
	10 26-inch spur wheels.....		550
	2 pr. couplings to main line shaft.....		770
	6 19½-inch spur wheels.....		306

1848.		
Jan. 14.	1 16-inch gad wheels	22
	14 mitre wheels, 54 cogs	466
	3 sleeves for smut mill shaft	63
	3 mill shafts	215
	2d, 6th, and 10th uprights	1,398
	3d, 7th, and 11th "	876
	1 shaft, No. 20	109
	2 " " 16	116
	2 " " 25 and 36	72
	1 " " 38	89
	3 " " 21, 22, 23,	99
	2 " " 34, 35	105
	2 " " 17 and 18	113
	1 " " 25	119
	1 " " 19	109
	3 pr. couplings	240
	1 main driving spur wheel	1,868
		lbs. 27,607

1848.		
	Am't brought forward	27,607
	20 pulleys, 46-in. do., 4¼-in. face	590
	9 pr. bevel wheels, 36 and 50 cogs, ea. 88	792
	8 16-inch pulleys, 5-in. face	480
	3 10 " " 8 "	81
	2 18 " " 4½	76
	2 24 " " with flange & arms	174
	1 18 " " " "	55
	2 16 " " 5-in. face, and 2-16 gud. for same	104
	2 26-inch spur wheels	110
	2 gud. necks, 18 in. length	43
	2 26-inch spur wheels	110
	3 gud, 23 inch. long, for do	60
	2 trotter hopper cams	28
	2 11-in. gud. "	35
	4 gud. wings, 6½ and 5½	69
	13 pr. couplings gud	81
	12 " 16-inch pulley shafts	72
	6 couplings wings and 3 knockers	41
	24 gud. wings, 5½ and 4, neck 2¾ by 1⅝	156
	4 pr. couplings to uprights, 51	204
	4 " " horizontals Nos. 14, 15, 26, 27, 24, and 25	
	3 pinions to smut mill shaft	150
	3 bridge pots for 30, 31, and 32	59

1848.

	7 shafts, Nos. 24, 26, 27, 28, 30, 31, 32....	868
	2 pr. bevel wheels for hopper.....	300
	4 uprights shafts, Nos. 48, 12, and 13.....	770
	2 horizontals shafts, No. 14.....	330
	3 standards for upright No. 152.....	456
	2 flanges to shaft No. 38.....	45
	Lul for wooden arms and sleeves..... } 1 collar for 2 hopper bags..... }	150
	2 hopper box shafts, each 195.....	390
June 18.	2 oil pots for hopper bags.....	16
" 20.	4 sheeves.....	21
		lbs. 34,583
	Deduct.....	2,000
		32,583

Wrought and Steel Work.

3 steel step points to upright, 33¾, a 3*s*.....	12 66
12 spindles " " (steel) 17½, a 3*s*.....	6 56
12 steel steps and guide, 37, a 3*s*.....	13 88
4 bolts to main pillow block, 21½, a 1*s*.....	2 69
Nuts for " " 51, a 1*s*.....	65
Strap and rivet to stone hopper, 25, a 1*s*. 2*d*.....	3 13
24 keys and pins to spindle, 12, a 1*s*. 2*d*.....	1 50
12 bolts for couplings, 35, a 1*s*.....	4 38
3 steel points to 3 steel steps for smut mill shafts.....	4 03
3 steps and 3 guides for uprights, 30, a 3*s*.....	11 25
28 pillow block bolts, 188, a 1*s*.....	23 50
12 bridge tree " 56, a 1*s*.....	7 00
8 bands to 6½-in. wing gud., 21, a 1*s*.....	2 63
37 " long neck " 113 a 113, a 1*s*.....	14 13
36 " coupling " 36, a 1*s*.....	4 50
4 keys to upright steenes, 4, a 1*s*.....	50
Lot of keys, 52, a 1*s*.....	6 50
1 hoisting screw.....	15 00
6 lighters " a 24*s*.....	18 00
6 damsels " a 24*s*.....	18 00
1 handle for hoisting screw, 15, a 1*s*.....	1 88
2 steel points to hopper bag shafts, 3, a 3*s*.....	1 13
2 " steps " " 6, a 3*s*.....	2 25
3 bales to hoisting screw, 66½, a 1*s*. 2*d*.....	8 31
Wro't work on flour cooler..... } 26, a 1*s*. 2*d*. Braces to hopper bag shaft..... }	3 25

12 bolts to hopper bag, $6\frac{1}{4}$, a 1*s*.....		78
2 pairs to hoisting bails, $13\frac{1}{2}$, a 1*s*. 2*d*.....		1 69
		189 82
32,583 lbs. castings, a $4\frac{1}{2}$ in.....		1,466 23
		1,656 05
Contract for engine and fixtures complete.....		3,150 00
		4,806 05
Bill of lumber.....		148 01
Bill of freight.....		133 64
Bill of lumber for stores.....		414 69
Clamp screws for lading.....		27 13
Int. 90 days on $415.....		6 22
Paid L. L. Smith's bill, cash.....		62 51
4 mo's int. on $500, to pay Bailey.....		10 00
		5,608 25
H. & M. bill.....		5,576 00
Balance due H. & L., Dec. 18th, 1848.....		$32 25

Dec. 18, '48.

Rec'd, Wilkesbarre, from Hillard & Mordecai, thirty-two $\frac{25}{100}$ dollars, the same being balance in full due us for work as per contract dated Sept. 11th, 1847.

HOPKINS & LEACH.

The plaintiffs also gave evidence to prove, and claimed that they had proved, that the engine, boilers, and apparatus which were made by Hopkins & Leach at Elmira, and set up in the plaintiffs' mill at Wilkesbarre, were not made of the best material, nor in a substantial or workmanlike manner, but were badly contrived, made, and put up, and were not put in operation, and had not sufficient strength or capacity to *dry* six run of stones, with the gearing and machinery attached for flouring and gristing purposes; that the plaintiffs expended large sums of money to put them in a condition to run; that they were not in a condition to run until about January, 1850, and would not then or ever drive six run of stones in the mill, and that they sustained damages thereby; that when the accounts were balanced on the 18th Dec'r, 1848, the engine had not been tried or run in connection with the mill, and had not been tested.

That notice of its failure was sent to Hopkins & Leach, by letter of Dec'r 27th, 1848, who attempted thereafter to put the engine

in operation, and failed; and that notice of such failure was thereafter sent to the defendant by letter dated May 29th, 1849, and June 21, 1849.

The plaintiffs also read in evidence a letter to the defendant, dated June 23, 1849, enclosing a copy of a survey on the engine, being as follows:

WILKESBARRE, *June* 23*d*, 1849.

M. S. BENJAMIN, *Elmira, N. Y.*

DEAR SIR: Enclosed you will please find a copy of survey held on the engine in the mill, and also copy of letters written Messrs. Hopkins & Leach on the subject. We must require an immediate answer, whether or not the work recommended by the surveyers to make the engine run complete will be done by Hopkins & Leach, as contractors for said engine, or yourself, as their security of its performance.

Resp'y, your ob't ser.,
HILLARD & MORDECAI.

The plaintiffs proved the signatures of the subscribers of the survey, and offered in evidence the said survey; to the admission of which in evidence the defendant's counsel objected.

The court overruled the objection, and admitted the paper, and the defendant's counsel excepted. Said survey was as follows:

WILKESBARRE, *June* 23, 1849.

We, James Brooks, of Frankfort, Phila. county, and Thomas Thatcher and William Stuart, of Wilkesbarre, all of us being machinists and practical engineers, do certify that, having been called upon by Messrs. Hillard & Mordecai, of Wilkesbarre, to examine their engines now in the mill of said Hillard & Mordecai, and fully investigate the causes of alleged difficulty in the working and effects of the same, we have carefully, and to the best of our judgment and ability, performed that duty. We have examined the engine while at rest, and also in operation—first as applied to two run of stones; then to four run, and lastly to the six run, and find it insufficient to perform the required duty of driving six run of stones; or, indeed, to be run at all now, without doing some injury to the mill on account of the irregularity of the motion, as even in our experimental examination to-day a spindle was broken.

We believe the main cause of the irregularity in the motion of the engine to be the manner which the engineer has adopted for the working of the valve, to wit, by using the old cam motion; and it is our full conviction, that if he would take off the said cam, and apply an eccentric as used by engineers generally, put six additional bolts in each of the cylinder heads, with an additional weight of at least one ton to the fly-wheel, that that part of the difficulty now encountered would be avoided and removed.

We also are of opinion that the two flue boilers now in the mill are not of sufficient capacity to generate steam enough for an engine of the dimension of this one, or to furnish power to run the six run of stones in the mill. We would have preferred plain cylinder boilers, but still think that the present may be lengthened out, and put in good tight order, and we would recommend an addition of ten feet to each boiler; and this being done, would say that the machine will be fully capable of driving the whole of the six run of stones, with their necessary appendages, completely.

We also state the extra fly-wheel is of no use, but is, indeed, a disadvantage.

We give the above as the result of our full, candid judgment. We have examined the engine carefully, and have investigated it in the best manner we could employ to arrive at correct opinions, and after reflection and deliberation thus state our conclusion.

JAMES BROOKS,
THOMAS FLETCHER,
WM. L. STEWART.

It was proved by the plaintiffs that the foundation was ready to receive the engine in the latter part of September or first of October, 1848, and that notice thereof was then sent to Hopkins & Leach, and that it was first put in operation, and started with two run of stone, grinding coarse grain, corn and oats, on the 25th of December, 1848, and that on the 27th of Dec'r notice by letter was sent to Hopkins & Leach that it did not work well.

The plaintiffs having rested their case, the defendant's counsel moved for a non-suit, and insisted to the court that the defendant's contract was merely a *guanty* in the alternative of the performance of the contract by the delivery of the machinery, and the refunding of the moneys to be advanced by the plaintiffs before the machinery was made, and also that the advances made by the plaintiff being in drafts, and not within the time limited by the contract, the defendant was not liable on his guaranty, and also that *that* the plaintiffs, as against the defendant, had no right to pay or advance to Hopkins & Leach anything beyond the $4,000 until they had fully performed their contract, and that the plaintiffs having fully paid off Hopkins & Leach before and on the 18th Dec'r, 1848, the defendant was thereby discharged from his guaranty, and was no longer liable thereon; and that when the plaintiffs paid off the balance, and receipts were given, the defendant had a right to consider his guaranty as at an end, and either give up his indemnities or omit taking securities for his indemnities.

The court thereupon overruled the motion for a non-suit, and the defendant's counsel excepted.

The defendant gave evidence to prove, and claimed that he had proved, that the engine was made, and finished, and put in opera-

tion pursuant to the contract; that the plans for the gearing were furnished by the plaintiff's agent, and were followed by Hopkins & Leach; that the materials used and work done were of the best quality; that the engine was capable of driving six run of stones; that the gearing was erroneously planned; that the size of the boilers limited in the contract was inadequate for so much work with the fuel the plaintiffs used; that the engine was fully tried and was accepted by the plaintiffs before the settlement; and that the fault was in the millwright's work, and not in the steam-engine.

The defendant called the said Frederick Leach as a witness to prove, among other things, that the plaintiff had extended the time for the performance of the said contract with Hopkins & Leach, who testified as follows: "We did not get the whole completed by the first run of water in the spring, which was in the latter part of March, or the first of April, 1848; we then loaded what we had ready, being a part of the engine and some lumber; I sent with it some of Isaac Mead's work. In January, 1848, I wrote to Hillard & Mordecai that I would like to put more work on the engine; that their millstones could not arrive by the first rise of water, but that I could get the engine ready by the next rise of water in June. I afterwards wrote them again in February. I received a letter from D. Mordecai, their clerk, dated Feb'y 24th, 1858, in which they say, 'As to sending down the ark, we leave that altogether with you.' I went down on the first ark load with Mead; we were parts of two days going; it is a little less than one hundred miles; I unloaded and delivered what I brought at Hillard & Mordecai's storehouse; Hillard was there. Very little if anything had then been done about the mill building. I think I took down that time a large majority of the machinery and boiler, and pretty much all the engine, but the polished work; the main connecting rod was not taken down till June; the smoke-stack was not taken down then, nor all the gearing irons, nor all the shafts. While there I had some talk about the building being so far behind what we had expected; I complained that he was not ready; that we would be compelled to pay interest for a longer time than we would, if the contract was fulfilled.

"He replied that I had wanted more time. He came to the ark, and we had conversation there. It was agreed between him and me, that he should allow us more time to finish and bring down the engine, and other work and materials; that I might bring them down in the June rise of water, and that I should then bring his millstones for him from Elmira, and should also put extra work on parts of the engine irons, to make it a polished job, which would cost me about $200 extra. It was also agreed that I might have till October to deliver some parts of the work, and that I should give him notice when I was ready; I complained of the running of interest on the money advanced while he was not ready for the

engine and other work; and then it was we agreed upon the delay of delivery, and he promised that the matter of the interest should be made right on the final settlement.

"I sent down the second ark load in June at the second rise of water that year, and the residue in October."

The defendant to prove a settlement between Hopkins & Leach and the plaintiffs, and a discharge of the defendant from liability on his contract, and that the defendant had given up certain securities to said Hopkins & Leach, further examined the said Frederick Leach, who testified as follows:

I had a settlement at the store of Hillard & Mordecai, near the mill; David Mordecai was at the store, their general agent, carrying on their business; he made out this account against me; this is the account then produced, and the receipt upon it is the receipt I took on the settlement, being as follows:

Messrs. Hopkins & Leach in account with Hillard & Mordecai, Dr.

1848.				
Oct. 26.	To 1 pt. oil		19	
Nov. 3.	21 lbs. boiler iron		1 68	
16.	1 pr. boots (per S. Mead)		3 50	
	1 yd. ticking for Stewart		12	
17.	1 cloth table cover, pr. *dr*		5 00	
	186 lbs. iron, 5½		10 23	
20.	55 lbs. " 5½		3 02	
	2 quarts alcohol, 19		38	
21.	1 qt. oil		22	
	1 keg white lead		2 00	
24.	½ gall. linseed oil, 87½		44	
28.	39 lbs. block tin, 25		9 75	
	1 qt. oil		19	
	Am't of merch. from store		36 72	
Dec. 2.	Credit by return 40 lbs. iron, 5½		2 20	
				34 52
	To 278 ft. oak lumber, $12		3 31	
	61 " pine " 6		37	
	4 bolts, 41 in		3 28	
	8¾ days' carpenter work, pr. J. R. Drake, 1 37½		12 03	
	2½ days' carpenter w. d., pr. D. Frederick, 1 37½		3 44	
	12¾ days' labor do. sundry hands, 75		9 56	
	packing yarn, 20		4 00	
	16 leather belting, 30		4 80	
				40 79

1847.					
Dec. 12.	To am't draft remitted them.....			2,000 00	
1848.					
Feb'y 14.	" paid our acceptance for them			700 00	
25.	" " " " "			1,720 00	
Ap'l 5.	" cash paid them.....			50 00	
Aug. 12.	" paid our acceptance for them			600 00	
May 24.	" cash paid them.....			85 00	
Nov. 1.	" paid R. Stewart.....			10 00	
10.	" do. do.			5 00	
10.	" do. for lampblack, &c.....			30	
				$5,170 30	
	11 months 19 days' int. on $2,000.....	113 00			
	9 months 14 days' int. on $700.....	33 00			
	9 months 3 days' int. on 1,305 31.....	59 38			
	7 months 25 days' int. on 50.	1 96			
	3 months 19 days' int. on 600.....	10 90			
	6 months 7 days' int. on 85.....	2 65			
			221 02		
					5,391 32
	Adam Bubi's bill of blacksmithing...		8 41		
	J. B. Williams' do. steam-pipe...		4 40		
	A. C. Lanny's do.....		6 75		
	John Bubi's do. blacksmithing		1 00		
	B. W. Wells' bill for board of Steward and Mead.....		30 00		
	H. & V. McAlpin, bill sundries.....		49 88		
	Hiram Pease.....		6 00		
					106 44
	Bill of tolls on canal.....				2 93
					5,576 00
Dec. 18.	To cash.....				32 25
					$5,608 25

Settled in full by am't of Hopkins & Leach's bill of this date, as per contract.

HILLARD & MORDECAI.
D. MORDECAI, *Att'y.*

The witness Leach further testified at the same time I presented my account, and the same was settled and receipted, and is the same contained in the deposition as an exhibit.

Said account and receipt were put in evidence by the defendant.

The witness proceeded: They paid me the balance of $32 25 at that time. I then told Mr. Hillard I lost money by the job, and asked him to make me a further compensation; he reflected upon the matter pretty much all day, and towards evening he told me I might draw on Hillard & Mordecai at six months for $500, and he would accept the draft; and if the mill worked as well at the maturity of the draft as it did then, he would pay half the amount of the draft, and would try to induce his partner to pay the other half. I gave security that if the engine did not turn out so, I would take up the draft, and I gave Mead as surety at the time, and afterwards Mr. Ely. When the draft matured, Hillard & Mordecai let it be protested, and I took it up and have it now.

Soon after the settlement with Hillard & Mordecai I went back to Elmira and showed to the defendant, Mr. Benjamin, the receipt they had given me, and required him to give up the security he held, that I gave him for signing the guaranty, and for money I had borrowed of him. Our firm of Hopkins & Leach had personal property about the furnace worth from $7,000 to $8,000, on which he held one chattel mortgage. He then gave up the chattel mortgage, and also some six or seven thousand dollars of collaterals of ours which he held. Our firm dissolved soon afterwards, and I went in with other parties. Hopkins went away to California. At the time I brought home the receipt, Mr. Benjamin and I had a final settlement, and closed borrowed account and all.

Hopkins & Leach dissolved about January 1, 1849. Mr. Benjamin sometimes loaned us money, and we gave him notes as collateral. There had been more or less of this during the whole of Hopkins & Leach's business. He had the chattel mortgage a long time; I think we gave it some little time after he signed this guaranty. Hopkins & Leach settled with Benjamin about the time of the dissolution. The new firm of Leach, Potter & Covill bought out Hopkins & Leach, and to some extent the notes of the new firm were given to Benjamin to take up notes of the old firm. The new firm gave no securities or mortgages to Benjamin; all the collaterals of the old firm were given up by Benjamin on the settlement, and in place of them, Hopkins & Leach gave him the notes of Leach, Potter & Covill, the new firm. Benjamin gave up the collaterals, and Hopkins & Leach substituted the paper of the new firm. I do not know what became of those latter securities; Mr. Benjamin continued to hold them when I left. An account was made out of these transactions, &c. Mr. Benjamin had the account in his books; he had a clerk. The account in his book

contained everything except the mortgage. His clerk was present at the settlement. I do not think any receipts were passed.

In order to make the sale or transfer to the new firm, we had to settle with Benjamin and get up the mortgage he had on our property, which was the very thing we were selling.

The court charged the jury that the defendant was responsible on his contract, not only for the repayment of the moneys advanced to Hopkins & Leach, in case they failed to make and deliver the engine and machinery, but also for the faithful and full performance of all parts of Hopkins & Leach's contract, and that he was liable, in case the engine and machinery were not such as to drive six run of stones suitable for grinding. To this part of the charge the defendant's counsel excepted. The court further charged the jury, that the waiver by the plaintiffs of the punctual delivery of the engine and machinery, and the enlarging the time for the delivery and setting up of the engine and machinery, did not constitute such a change in the agreement as to discharge the defendant as guarantor. To this part of the charge the defendant's counsel excepted. The defendant's counsel requested the court to charge, that if the jury believed that the performance of the contract between Hopkins & Leach was essentially altered or varied, or the time for the delivery of the machinery at Wilkesbarre extended upon a good consideration, without the consent and knowledge of the defendant, that then the plaintiffs are not entitled to recover.

To this request the court charged that a mutual alteration of the contract by the agreement of the principal parties would operate to discharge the defendant as guarantor; but that an acquiescence on the part of the plaintiffs in a longer time than specified in the contract for its fulfilment, especialy as the time of fulfilment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant. To which charge and refusal the counsel for def't excepted.

The court further charged the jury that the acceptance of the engine and machinery by the plaintiffs, and their settlement with Hopkins & Leach, and payment of the full price therefor, and their giving of the receipt to Hopkins & Leach, and the production of that receipt to the defendant, and his then giving up his securities for indemnity, did not in any way discharge the defendant, or put an end to his liability on the guaranty. To this part of the charge the defendant's counsel excepted. The defendant's counsel requested the court to charge, that if the jury believed that the plaintiffs did settle with Hopkins & Leach on the 18th December, 1848, and did then pay Hopkins & Leach the full balance due for and on account of the contract, and passed receipts with Hopkins & Leach, that such settlement and full payment discharged the defendant; but the court so refused to charge, and the defendant's counsel excepted to said refusal.

The defendant's counsel also requested the court to charge, that if the jury believed that the defendant, relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach, and surrendered to them securities he held, to indemnify him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs, and upon the faith of it the plaintiffs are bound by such settlement, so far as the same relates to the defendant, they having, by such settlement and receipt, put it in the power of Hopkins & Leach to procure such securities and discharge from the defendant; but the court refused so to charge, and the defendant's counsel excepted to such refusal. The defendant's counsel also requested the court to charge, that if the jury believed from the evidence that the plaintiffs, and Hopkins & Leach, by the settlement which took place on the 18th December, 1848, and by the receipt given to Hopkins & Leach on that occasion, which receipt being shown to the defendant, induced him to believe they had given a practical construction to the contract, as being performed, so far as he was concerned, and that, relying thereon and believing the contract had been performed, he surrendered the securities held by him, the plaintiffs were not entitled to recover; but the court refused so to charge, and the defendant's counsel excepted to such refusal.

The court further charged the jury, that the guaranty of the defendant was as broad as the contract of Hopkins & Leach, and was for the whole and entire performance of their obligations, and unless they had become discharged as principals, he continued liable as guarantor. To this part of the charge the defendant's counsel excepted. The court further charged the jury, that in case they found that the engine, boilers and apparatus for steam power were insufficient to drive six run of stones suitably for grinding, the damages to be found should be such sum as would enable the plaintiffs to supply the deficiency. The defendant's counsel requested the court to charge, that the value and price of an engine, boiler and apparatus, sufficient to drive six run of stones suitably for grinding, was fixed by the contract at $3,150; and that in any assessment or question of damages the jury were to assume that sum as the full value of such perfect engine, boilers and apparatus; but the court refused so to charge, and the defendant's counsel excepted to such refusal.

The counsel for the defendant then further requested the court to instruct the jury, that if they found the fault was partly in the engine and partly in the millwright's work, then they should find only for the partial fault of the engine, and the court did thereupon so instruct the jury.

The jury found for the plaintiffs, with six thousand dollars damages.